

MINUTES
REGULAR MEETING OF BOARD OF LAND COMMISSIONERS
January 22, 2008, at 9:00 a.m.
Room 303 State Capitol Building
Helena, Montana

PRESENT: Governor Brian Schweitzer, Attorney General Mike McGrath, Superintendent of Public Instruction Linda McCulloch, and State Auditor John Morrison

ABSENT: Secretary of State Brad Johnson

Mr. Morrison moved for approval of the minutes from the December 17, 2007, meeting of the Board of Land Commissioners. Seconded by Ms. McCulloch. Motion carried unanimously.

BUSINESS CONSIDERED:

108-1 FWP: SAUERKRAUT – WILLOW CREEK CONSERVATION EASEMENT

Ms. Sexton said FWP is proposing to fund a conservation easement of 7869 acres of contiguous property owned by the Sunny Slope Grazing Association and the Nature Conservancy in Lewis and Clark County. They would provide a grant of approximately \$5.3 million from the federal Habitat Conservation Plan (HCP) land acquisition program.

Paul Sihler, Administrator FWP Field Services Division, stated this is a partnership project between FWP, the U.S. Fish and Wildlife Service, the Nature Conservancy, and the Five Valleys Land Trust. The partnership is part of the Blackfoot Challenge's community project which has received a lot of national recognition and involved the Nature Conservancy acquiring 88,000 acres of Plum Creek Timber land in 2003. This easement is part of the takeout and the final conservation solution for putting a portion of that land in a conservation situation. Mr. Sihler said that FWP asks that the Land Board to approve \$5.3 million of funding for the 7869 acres of the conservation easement that would be on land owned by the Sunny Slope Grazing Association, Susan and Gerald Biresch, and the Nature Conservancy. The Nature Conservancy will then sell their land to the Sunny Slope Grazing Association.

The project is a good deal from a conservation perspective because it conserves one mile of the Blackfoot River and 29 miles of tributaries, including both active channels with wildlife habitat and intermittent and dry channels. The area is critical for bull trout and westslope cutthroat, which is why the U.S. Fish and Wildlife Service is providing funding under the Endangered Species Act. FWP will continue to work with the landowners on habitat programs in the streams in an ongoing relationship.

The property is also important as a north-south migration corridor for grizzly bears and ungulates—subdivision in that area would have a significant wildlife perspective. From a financial perspective, there is no state funding going into this project. All funding is from the Fish and Wildlife Service and is earmarked through the HCP funding source. There is also a huge donated portion from the Nature Conservancy. The conservancy agreed to complete these transactions and the takeout from the Plum Creek deal when they originally purchased the property in 2003. This is over a \$1.25 million donation from the Nature Conservancy based on the increase in property value since they purchased the property.

MINUTES
December 17, 2007
Page 2

There were 32 people or organizations that participated in the public involvement process. Nineteen of twenty written comments supported the proposal. The other expressed no opinion either way. The FWP Commission approved the project on a 4-0 vote with unanimous applause from the audience at the meeting.

Mr. Sihler stated that a few questions had come up about access. The Sunny Slope Grazing Association and the Bireschs have been under Block Management for a number of years. There is no indication that would change as a result of this easement. There are also two parcels of state land that are holdings within the Biresch Ranch. FWP is working on a separate legal agreement that would provide legal access to the state parcels through the private land. The conservation easement does not have perpetual hunting access as one of the terms, largely because the landowners had some concerns about putting access into a perpetual conservation easement, even though they were happy with past access arrangements and expect to continue into the future. Both FWP and the FWP Commission recognized this issue and felt with all the other positive aspects, the fact that there was not a permanent hunting easement was not a deal breaker for the project. There is no reason at this point to think FWP cannot continue to work with the land owners on future access.

Dana Post, Big Blackfoot Chapter of Trout Unlimited, stated BBCTU's formal support of the Sauerkraut – Willow Creek Conservation Easement. Both streams are important native trout tributaries to the Blackfoot River. The associated protection of these areas would be an important step toward BBCTU's mission to restore the coldwater fishery of the Blackfoot River and its tributaries. The restoration and management of the associated riparian and upland habitats will be an essential component of this project, and BBCTU is committed to facilitating related projects with landowners and project partners. Since the early 1990s, BBCTU has taken a lead to restore the river and its fisheries in partnership with nonprofits and several federal, local, and state agencies. The restoration program is voluntary and non-regulatory, centered on implementing restoration projects that have an objective of being win/win for both the resource and the private land owners who require sustainability. A major element of BBCTU's restoration approach seeks to address native fish requirements and issues across the entire watershed. The issue in the Blackfoot River is a ridge top to ridge top philosophy that looks beyond the ordinary high watermark of rivers and streams. Instead it looks to keep the entire watershed functioning. Native westslope, cutthroat, and bull trout require clean, cold, complex water for their life histories. Thus, an unfragmented, intact landscape is critical for their success. The proposed conservation easement on Sauerkraut and Willow Creeks along with landowner commitment is a critical step and important tool in reaching the collective goal of maintaining an intact and healthy watershed. BBCTU is excited about the opportunity to work collectively in this area of the Blackfoot Watershed.

Hank Goetz, Blackfoot Challenge, urged approval of the project. He referred to Mr. Sihler's comments on access and stated that of the total 89,000 acres in the Blackfoot Community Project, there is guaranteed access on over 85 percent of the land.

Grant Kier, Executive Director of Five Valleys Land Trust, stated that the land trust is excited to be a part of the enormous collaboration and that it had been a pleasure to work with FWP throughout the entire process. He said it is a tremendous victory for Montana's native trout species and that Five Valleys Land Trust is excited about future projects with FWP. Mr. Kier also passed out a letter from the Hellgate Hunters and Anglers Association in support of the project.

MINUTES
December 17, 2007
Page 3

Motion was made by Ms. McCulloch to approve the conservation easement. Seconded by Mr. McGrath.

Mr. McGrath commended the parties involved in the project for their good work.

Motion carried unanimously.

108-2 BOARD OF REGENTS: FINAL APPROVAL FOR SALE OF MSU-NORTHERN LOT

Ms. Sexton stated this is for approval of a sale for 2.42 acres of land in Hill County in Havre. The property is owned by MSU-Northern and was appraised for between \$40,000 and \$63,000 in July 2007. Notice was published and bids were opened on November 2, 2007. A bid of \$52,000 was the highest bid received and the Board of Regents authorized MSU to enter into a purchase agreement, contingent upon Land Board approval. An EA checklist was completed. The sale lot is not trust land and proceeds of the sale are to be used for deferred maintenance projects at the MSU-Northern campus.

Motion was made by Mr. McGrath to approve final sale of the lot. Seconded by Mr. Morrison. Motion carried unanimously.

108-3 PRELIMINARY APPROVAL FOR TUPPER LAKE LAND BANKING ACQUISITION

Ms. Sexton stated that there are two proposals for preliminary approval of land banking acquisitions. The first proposal is for 1700 acres near Tupper Lake which is owned by the Nature Conservancy. The land is northwest of Lincoln and east of Ovando. There is access by county and Forest Service roads, except for one 80-acre parcel. The parcel will come with an access easement for resource management and will be accessible during the hunting season through FWP's Block Management Program. The revenue will come from both timber and grazing with an annual rate of return of 60 years as implemented by Senate Bill 131 by the 2007 Legislature. The tract provides excellent wildlife habitat and has a long history of public use by the forest industry and the Nature Conservancy. Local communities and sportsmen support the acquisition. There is already an easement on the property with the U.S. Fish and Wildlife Service that is valued at approximately \$600 per acre, for a total cost of between \$1,000,000 and \$1,200,000.

Mr. Goetz stated the Blackfoot Challenge's support for the project. The project went through a series of public meetings within the valley and that parcel of land had always been designated for DNRC ownership.

Motion was made by Mr. Morrison for preliminary approval of the acquisition. Motion was seconded by Mr. McGrath. Motion carried unanimously.

108-4 PRELIMINARY APPROVAL FOR DEBRUYCKER FARM LAND BANKING ACQUISITION

Ms. Sexton stated this land banking parcel lies between the Vandalia Ranch property in the Glasgow area, which was granted preliminary approval at the December Land Board meeting, and the Tupper Lake property (108-4). The land is between Teton and Chouteau Counties.

MINUTES
December 17, 2007
Page 4

The property is 5140 acres with CRP acreage, dry land farming used primarily for winter wheat, and some grazing land. The sale price is \$5 million. The access for the property is primarily Highway 221 and petitioned county roads. The predicted annual rate of return for the property is 2.73 percent. There is also the potential for wind development. Owners in the Teton Ridge area have put up anemometers and have collected information for the past two years. There is multiple use: CRP, grazing, wildlife habitat, and hunting (primarily of pheasants). The Teton County Commissioners were contacted regarding the sale.

Joe Dellwo, Teton County Commissioner, expressed concern over lost revenue for the county of approximately \$12,000 in property tax. If there was a way to make up the revenue, Teton County would be in favor of the project.

Mark DeBruycker, co-owner of DeBruycker Farm, said that DeBruycker Farm has met with Teton County and agreed to mitigate any loss in revenue. DeBruycker Farm does not want Teton County to lose any revenue. DeBruycker Farm supports public access and likes the fact that the state also grants public access. The ground is 50- to 55-bushel winter wheat ground and the wheat market should be in firm ground for some time to come. The land should provide a great revenue enhancer for the state. There is also excellent wind potential on the property and that should also increase tax revenue for Teton County.

Motion was made by Mr. Morrison for preliminary approval of the land acquisition. Seconded by Mr. McGrath.

Mr. McGrath asked how much money is currently in the land banking fund since the Land Board has just given preliminary approval for both the Vandalia and Tupper Lake properties, which are substantial investments. He questioned if approval of the DeBruycker property would put a strain on resources with commensurate sales.

Ms. Sexton said the DNRC estimated that by the end of the next fiscal year there would be \$11 to \$15 million dollars in the land banking fund. She stated there needs to be a rotating purchase/sale cycle, and in fact the next item on the agenda is setting a minimum bid for a land banking sales. A substantial income from the sales is expected with the next year to year and a half.

Mr. McGrath asked if the current balance was about \$3 million.

Ms. Sexton stated the current balance was \$3.6 million. She also said that there are a number of parcels for sale in addition to those going through today, and that the DNRC is working on setting minimum bids and getting those parcels ready for sale.

Mr. McGrath asked if the Land Board would be seeing those sales in upcoming months.

Ms. Sexton said yes.

Motion for preliminary approval of the DeBruycker acquisition carried unanimously.

108-5 SET MINIMUM BID FOR LAND BANKING PARCELS

Ms. Sexton stated that this sets the minimum bid for land banking parcels in Garfield and Chouteau Counties. Parcels are already for sale in nearby Teton and Pondera Counties. A total of 4160 acres are available with an estimated revenue of \$640,380. A cultural resources survey and independent appraisals have been completed. There are two appraisal values: one with access and one without. The DNRC recommends that the minimum bid be set with access at \$640,380.

Motion was made by Ms. McCulloch to approve setting the minimum bid with access. Seconded by Mr. Morrison. Motion carried unanimously.

108-6 Land Banking Rules Proposed Amendments

Ms. Sexton stated that DNRC proposes to amend the land banking administrative rules based on laws passed in the 2007 Legislative Session. SB 131 was passed to modify land banking sales, limitations, and purchases. As a result of the changes, the sunset date for the land banking program has been moved from 2008 to 2011. The number of days from auction that bid deposits must be received was shortened from 45 days to 20 days. The DNRC received a number of complaints that 45 days was onerous for those securing loans for purchase. The bid bond amount for the minimum bid is lessened from 50 percent to 20 percent. The amendments also provide for collection of funds from the prospective purchaser prior to the state incurring costs of sale related expenses. The DNRC found that it was adding up a lot of expenses in surveying, palaeoanthropological studies, advertising, etc. With the rule change, these expenses will be contracted by DNRC and will be reimbursed to the state by the applicant at closing. The accounting period for forested lands has increased from 20 years to 60 years. February 4, 2007, is the proposed filing date for the Notice of Hearing for Proposed Amendment and Repeal. The Notice would be published in the Montana Administrative Register (MAR), and subsequent timeline dates would be based accordingly. Since the changes are statutory, the department is currently operating under statute until the rules can be published. The department recommends that the Land Board initiate the rulemaking process for ARM 36.25.801 through 36.25.817.

Motion was made Mr. McGrath to initiate the rulemaking process. Seconded by Ms. McCulloch. Motion carried unanimously.

108-7 RIGHTS-OF-WAY APPLICATIONS

Governor Schweitzer said that usually the rights-of-way are done as a package, but due to commenters present on a particular easement, that one will be heard separately.

Ms. Sexton recommended that the Robert and Margaret Jensen historic right-of-way application be segregated from the rest of the easements and heard first. The application was for an historical easement to access a single family residence. The DNRC denied the request. The applicants (Jensens) are already co-holders of an existing easement granted to them in 1977, that authorized access to the residence. The Jensens did construct a portion of the access to their easement; however, they did not construct a road to their residence and have chosen to use another road that is in existence on state land. The road the Jensens have been using to their land is unauthorized and they are requesting that an historic easement be placed upon the existing road. DNRC staff looked into the situation and recommended that that 1977 easement be extended from a ten-foot to a thirty-foot easement, and also that there be fencing and a cattle guard or gate put in due to concerns from ranching activity on the road. A number of letters

MINUTES
December 17, 2007
Page 6

were written between the Jensens and the DNRC. The DNRC did deny the application, but have agreed to work with the Jensens to widen the existing access and assist in the building of a fence to keep the cattle out. The DNRC decided that the Jensens had the ability to appeal the denial to the Land Board, and the appeal has been scheduled for this time.

John Bloomquist, attorney for the Jensens, stated that the Jensens appealed the DNRC's December 13, 2007, decision which denied the Jensen's application for an historic right-of-way on an existing roadway that accesses their property in Teton County. Pursuant to the appeals process outlined by Ms. Sexton, the Jensens are appearing to point out some errors in that decision which they believe warrant reversal of the Ms. Sexton's decision.

Mr. Bloomquist passed out materials to the Land Board for the official record including: a memo, copy of statute 77-1-130, MCA, a copy of the appeal to the Land Board, a map, a copy of the application (Exhibit A), historical information regarding access information that was historically associated with the easement (Exhibit B), and a survey of the actual easement from 1977 (Exhibit C). The Jensens believe that it is straightforward decision for the Land Board to reverse the DNRC'S decision according to the statute that governs historic rights-of-way (77-1-130, MCA). The DNRC's decision ignores statutory direction that was given to DNRC from the legislature in handling applications for historic rights-of-way under that provision. Private parties can apply to DNRC for deeds to existing roads for access to private property.

Under statute, the direction is very clear to DNRC. DNRC is mandated to review applications and *shall*—the word "shall" is used—issue an historic right-of-way if the applicant demonstrates the road exists and has been historically used prior to 1977. Under Ms. Sexton's decision, there is no basis for DNRC to hold that this road did not exist, the application is defective in any manner, or the applicant did not demonstrate the statutory criteria. Under subsection (3) in the statute, it states, "DNRC may not withhold approval for any reason other than the use of historic rights-of-way contrary to subsection (5) of the statute." Mr. Bloomquist stated there is nothing in subsection (5) that indicates this application or the road is contrary to that provision. The legislature has laid out the direction for DNRC and states specifically that the DNRC may not withhold approval other than something that is contrary to subsection (5), and that is not the case here. DNRC is obligated to approve the historic right-of-way and move forward with obtaining full market value and the laying out of the route. The DNRC's decision simply does not comport with legislative intent of historic right-of-way deeds. The Jensens request that the Land Board reverse the DNRC's decision and that their application be dealt with under the governing law and statute that deals with historic rights-of-way.

Mr. Bloomquist pointed out that there were some factual errors with the DNRC's decision and the rationale behind that decision (which he points out in the memorandum), but that the Land Board did not need to deal with those issues because 77-1-130, MCA, indicates that there is not discretion for the director of the DNRC on the grounds asserted. The DNRC was obligated by statute to approve this particular application and move forward. Ms. Sexton had noted it was the Jensen's choice to use a different road than that in the 1977 easement. The map (see memo) shows the existing road that the Jensen's currently use for access, the Lohman house, and the location of the 1977 easement. Exhibit B indicates that back in 1977, the Jensens predecessor and his attorney, Mr. Joscelyn, came to the Department of State Lands (which is now part of the DNRC) seeking an easement for access. Accompanying that application was a survey, that at the time, closely mirrored the route of the existing road. At that time, the Jensen's predecessor was seeking an easement for the existing road, which the Jensens are currently using. The road has been there for quite some time. The actual easement that was

MINUTES
December 17, 2007
Page 7

granted was for a different route than was shown on the survey on Exhibit B. The survey of the granted route is on Exhibit C, which has a route that provided a ten-foot strip for access to the property. The road is accompanied by a couple of sharp turns, one of them being 90 degrees before the road enters the Jensen's property. For the years that the Jensens have been there, they have been using a road that they thought was associated with a state easement. In the end, once people started looking at the records, that turned out to be different than the route laid out in the actual easement. The land easement that was laid out has a ten-foot strip and sharp turns. The Jensens do not believe that was, or is reasonable access as the DNRC determined.

Mr. Bloomquist stated that it does not matter that the existing roadway that provides access has a fence on the west side of the roadway, which creates a small parcel of state land that the Jensens travel through. What matters is statute, and the application of statute for historic rights-of-way. The legislature has been very clear on how historic rights-of-way should be handled. The Jensens respectfully ask that the board to reverse DNRC's decision as required by law, and also to reverse the decision from a matter of common sense. Mr. Bloomquist asked why go out and create an entirely new road on an entirely new route and incur that cost and impact when it is not necessary and it does not comport with statutory direction?

Garry Williams, DNRC Central Land Office Area Manager, spoke on behalf of Helen and George Higgins. He read a letter sent to him by the Higgins on Friday, January 18, 2007. The letter stated that the Higgins Ranch has ranched the land since 1948 and has had the state lease since then. The road in question has been in use for many years and has been used for the family to feed and move livestock from their pasture land to land across the Teton River where they conduct winter feeding. The road was established for ranching purposes. The Higgins Ranch has managed the state lease for many years and they have been excellent lessees and have worked with the DNRC on lease issues. In the last several years there have been a series of conflicts between the Jensens and the Higgins that involves livestock, livestock management, and livestock on the road. Several agencies have had to respond to complaints from the Jensens. As a result, the Higgins have requested that the 1977 easement that the Jensens hold to the route along the fence be enforced and that the Jensens use that route and fence it off to reduce conflicts between the Higgins' livestock and access to the Jensen's private driveway.

Karen Lohman, property holder between the Jensens and Higgins, read a statement on behalf of her husband and herself. Ms. Lohman stated she is upset that this problem started with cow poop on the road and has come to this. She hopes that together, a compromise can be reached that will work for everyone. The Lohmans do not like fighting with neighbors that have been so good to them all of these years. Unfortunately since the Lohman house is in the middle, they will be impacted the most. The Lohman house is on the west fence line and the DNRC is proposing the Jensens drive all the way to the Lohman's cattle guard, then turn north and follow the fence line to the Jensen's house. That will cause the Jensen's headlights to go right into the Lohman's living room window, causing the Lohman's dog to bark all of the time and run out and herd the Jensen's car.

The one thing that the Lohmans use the area for is for loading horse trailers. Once the area is fenced it will be unusable for that purpose. The Lohmans will also lose their privacy. The Lohmans do not understand why this is an issue. George Higgins leases the land west of the Lohman's house for cows and hay. The cows do not bother the Lohmans. The Lohmans want people to continue using their roads, regardless of whose roads they are. Leave the cows alone. The Lohmans would rather have cow poop on the road than headlights in their window.

MINUTES
December 17, 2007
Page 8

Motion was made by Mr. McGrath to support the DNRC's recommendation and denial of the historic right-of-way application. Seconded by Ms. McCulloch.

Mr. McGrath asked to hear from the DNRC's legal counsel about the statute pointed out by Mr. Bloomquist. Mr. McGrath pointed out that the Higgins deny there was an historic right-of-way for that purpose. Mr. McGrath asked if it mattered what the road was used for historically?

Tommy Butler, DNRC Trust Lands Attorney, agreed that the terms of the 1977 easement control in this situation. Mr. Bloomquist read out of 77-1-130, MCA, "the Board's discretion". Subsection (5) says the all important words, "...subject to the approval of the Board." Although seemingly 77-1-130, MCA, provides rights for people to obtain easements on school trust lands almost at will, that is not the case. Previous school trust law dating back more than 100 years in *State ex rel. Galen* at the district court states there can be no condemnation of school trust land by the public. That is because this board exercises plenary constitutional authority in the disposition of state interests in school trust lands. This board determines when to dispose of land or interest in land and at what price. The Montana Supreme Court has held that the legislature can set out processes by which lands can be sold and interests can be could disposed of, but this board holds the authority on how to do that and what terms. That is exactly what the Court held in the first Montrust case. This statute was the subject of the first Montrust case, and this statute was originally conceived by Representative Larry Grinde. It was a process by which people could pay 1972 land values and obtain interest in school trust lands. The Supreme Court struck down the statute, holding it was unconstitutional and that only the Board dispose of interest in school trust lands, not the public. They struck down the concept of a limitation in price. Statute was then revised to recognize the Land Board's discretion. So, in short, the Land Board can determine whether to support the director's decision or not; and whether to grant the easement or not. There is not an absolute right to the applicants for an easement.

Mr. Morrison asked if the department has made an evaluation as to whether an historic use existed before 1977.

Mr. Williams stated that the Jensens used the road prior to 1977.

Governor Schweitzer asked if the road used for access to the Jensen's property is fenced on either side?

Mr. Williams said that the road is not fenced. It is just a typical open, two-track road for grazing.

Governor Schweitzer stated that in reference to the cow poop on the road, the only way he knew of to keep cow poop off the road would be to have a fencing system. He asked if there would be water for the cattle if the road were fenced?

Mr. Williams stated that the state owns the entire section. The Higgins use the road to trail and feed their cattle. The area from the existing road over to the fence line that is being used by the Jensens and Higgins is roughly three acres. There is no water in that area. The Higgins use the road to trail their cattle to the Teton River.

Governor Schweitzer asked if access to the river would be lost if that area were fenced.

MINUTES
December 17, 2007
Page 9

Mr. Williams stated that fencing the requested route would affect the three acres between the Jensen's property and the road the Jensens are currently using. That is the primary reason the DNRC recommends that the road the Jensens use be moved closer to the fence line and that it be fenced off to eliminate that conflict between the livestock and the private driveway. In 1977, State Lands Commissioner Erbe, who made the decision on the original easement, recognized that the road was in existence at that time and he recommended—and all parties agreed—that the road be moved over to the fence line so that the existing state land could be used in a working manner. They recognized the possible conflict at that time.

Mr. Bloomquist entered a photo into the record that demonstrates there is a fence that runs along the west side of the existing road and creates the small area that Mr. Williams referred to. The fence runs from the county road in a northeasterly direction and along the roadway to the west. There is an east-west fence that creates a smaller parcel that this road crosses.

The Montrust case did not strike 77-1-130, MCA. The Montrust case struck the compensation formula which was part of the statute when it was inactive in 1997. The 1999 Montrust case did not strike the substantive parts of the statute that we are discussing in the handling of the application. Mr. Bloomquist asked the Land Board to read the statutory language on the obligations of the department, which is to approve the application subject to the approval of the Land Board, getting full market value, and making sure the route is identified. The statute does not give any discretion to the DNRC in the action to which is brought on appeal before the board today.

Mr. McGrath asked Mr. Bloomquist if his position was that the only discretion the Land Board had was to give full market value; not whether or not to grant an easement.

Mr. Bloomquist said under 77-1-130(3) and (5), MCA, the historic right-of-way must be issued by the DNRC and that all rights-of-way come to the board for approval and must be issued on the following terms: "...only for the minimum width necessary, as negotiated by the department and the applicant;" which the Jensens had not gotten to since the department denied the application; "and for the physical condition of the road...existing on the date the historic right-of-way deed is issued by the Department." The DNRC does have the ability to attach conditions to a right-of-way.

Mr. McGrath asked to assume for argument's sake that the DNRC did make a mistake. In terms of the Land Board, does it not still have discretion to grant the easement? Otherwise it is a prescriptive easement, which you cannot get from the state.

Mr. Bloomquist agreed that a prescriptive easement cannot be gotten against the state. Mr. Butler had talked about some cases and the Land Board's constitutional obligation, but equally clear is that the legislature is not without authority for the management and direction of state lands. In this instance, the legislature has set out a direction and process for historic roads and access, governed by 77-1-130, MCA. Ultimately, the Land Board has to approve a right-of-way. In this instance, the department's decision caused a misfiring of the process by denying the application on grounds on which the DNRC does not have authority to do.

Mr. McGrath asked if Mr. Bloomquist was saying that if the DNRC makes a mistake, that Land Board lacks discretion?

Mr. Bloomquist said the Land Board can remand the decision back to the DNRC. This decision was based upon a determination which has no authority in statute. The DNRC gets its authority from the legislature. He said the reason the Jensens are before the Land Board is because that the board is the appeals process that is provided.

Mr. McGrath stated that it is the discretion of the Land Board whether or not to grant the easement, irrespective of the DNRC.

Mr. Bloomquist agreed.

Governor Schweitzer asked Mr. Williams if there is a fence already there, and if so, why there would be a fence if there is no water on the other side? He also asked that if there is a fence there, then from which side are the cows accessing it from, and are they being let through a gate to graze and then back to the other side to access the water?

Mr. Williams said that it is not a typical right-of-way fence. The fence is about 100 feet off of the main road. It is a management fence constructed by Higgins Ranch. The Higgins Ranch uses that area and road to drive their cattle across the river to winter feed. The entire area is part of their normal ranching operation. There is no gate at that fence location to separate the cattle.

Mr. Morrison commented that on the bigger issue of what DNRC and the Land Board are required to do by statute. 77-1-130, MCA clearly says that what the department decides to do is subject to approval by the board. The legislature recognized the Land Board in numerous statutes. The legislature is not allowed to limit or interfere with the Land Board's fulfillment of its constitutional role. In cases such as these, the statute, Montana Constitution and the Enabling Act confirm the discretion upon the Land Board to make these decisions. Mr. Morrison clarified that the Jensens have been using the road without authorization and that the Higgins have had the state lease for decades: Higgins cattle are pooping on the road. The Jensens who are not authorized to use the road are complaining about the poop on it, and the Higgins are therefore asking for the old easement to be enforced. Did the Higgins have a problem with the Jensens using the road until the battle over the cow poop ensued? If an agreement were reached on the cow poop issue, could the Jensens keep using the road in the eyes of the Higgins?

Mr. Bloomquist stated that the Jensens are not opposed to the Higgins continuing to use the road. There used to be a cattle guard at the start of this road and the county road that was removed a few years back. That time was when the cow poop situation seemed to get worse. The Jensens have no opposition to Higgins grazing and using the area. The Jensens simply want their access road beyond the historic access.

Governor Schweitzer indicated that he could not find where the referenced fence was.

Ms. Sexton said the both the Higgins are present and can answer questions. She also reiterated that the DNRC went through the proper process: there were a lot of field inspections and the DNRC looked at the historic information, the best interests of the trust, and the long-term usability of the property has caused the department to recommend that the preexisting easement from 1977 should be the actual easement in order to avoid future conflicts. However, if other compromises could be reached, that would also be fine.

Helen Higgins, state land lessee, stated that at one time there was a cattle guard on the road the Jensens used. The road is a trail that has crossed state land since 1948 and leads to the

Teton River. When the Jensen home was built in the 1970s, the man who built it used the road to access his homesite; when the Jensens bought the property they did the same. Mrs. Higgins stated that Mr. Jensen told her that her mother had granted him permission to use the road to access the Jensen's site rather than using the easement, but she has no proof of this. Using the road has caused problems. The Higgins pulled the cattle guard about ten years previous because they had lost two registered limousines cows in the guard that were only three years old. The cows already had calves inside and were also with calf. The Higgins calculated that the cows had ten more years on them. The Higgins have also lost a horse, a colt, another cow, and various other animals over the years. When they lost the two limousines, Mr. Higgins pulled the cattle guard out. The Higgins lost nearly \$10,000 with that particular episode. It was the Higgins cattle guard to pull—an old wooden guard that was too narrow in length. The Higgins did not replace it. Instead, they built a fence from the south to the north and then the east to the west, leaving a three- to five-acre area in front of the Lohman's and Jensen's properties. Prior to pulling the cattle guard, there was no fence. The cows had access right up to the cattle guards. For future generations, the Higgins believe the 1977 easement needs to be used as it was granted, with the concession that a ten-foot easement is too narrow. The Higgins urge the state to extend the footage to whatever the state, Lohmans, and Jensens deem feasible; and then that that easement then be fenced in and a cattle guard erected.

Mr. Morrison asked what the trust's interest is, separate from the Jensens and the Higgin's issues?

Mr. Williams stated that the DNRC looked at the situation, met with the Jensens and their attorney, and recommended that the easement remain where it was originally granted along the fence line. The DNRC would like to see as little state land as possible encumbered under easement. When a road moves away from the fence line, it creates management problems with livestock, state lessees, and private driveway access. It is the DNRC's philosophy, and in the best interest of the trust, to decrease encumbrances along section lines if possible.

Mr. Morrison asked if the road in question that goes across the corner of state land is still going to be used, and if it is just a question of whether the Jensens will be using it or not.

Mr. Williams stated that the road is used by the DNRC lessees, the Higgins, and will still be used by them. The department's recommendation would separate the private driveway access and the use of lessee's use of the road. The DNRC does not want to see a permanent encumbrance jut out into state land.

Governor Schweitzer commented that in the past there have been requests before the Land Board to convert traditional agricultural easements to a trails. One example was on the Rehberg Estates outside of Billings. The Land Board took action to convert the lease from a traditional agricultural lease to one that would support development. The board has a requirement to protect the interests of state land and its value. Governor Schweitzer recognized that if an area is cut off, the opportunity for grazing is decreased. The map indicates that there is a vegetation change and the fence does not actually parallel the road, so the fence was not built for the road.

Governor Schweitzer commended Mr. Bloomquist for presenting the case and being flexible. Looking at best management of the land and financial responsibilities, the Jensens believe there is a mistake as to how the easement is described. He stated that he does not see that to be the

MINUTES
December 17, 2007
Page 12

case; and he hopes that the differences between the parties can be resolved and that cow poop should not be a factor because there is a lot of that in Montana.

Mr. McGrath stated he believed it was the Land Board's decision whether to grant the easement or not. The practical matter is that if the road is going to be used anyway, how does it harm the trust? The board is not required to grant the easement, but if the road is used anyway, what difference does it make?

Ms. Sexton said it was her understanding that with the granting of the easement, the Jensens desired to fence it in. There was not a desire to have cattle on the road and continue use as it has been historically.

Eric Eneboe, DNRC Conrad Unit Manager, stated that the whole thing started with his receiving a call about cow poop on the road. He tried to bring everyone together to resolve the matter, but does not believe that these folks will ever quite see eye-to-eye. If the private drive is not fenced the Teton County Commissioners and Fish, Wildlife and Parks will continue to continue to be inundated with questions about perceived problems on the road. The access road needs to be fenced separately. It makes the most logical sense to move the road where the original easement was granted.

Ms. Sexton stated that most problems arose because of the livestock issue involving the road that is being illegally accessed. The desire was to fence out the easement road to the Jensen property.

Mr. Williams said the whole discussion before the Land Board has resulted because of an application for an easement, a permanent encumbrance on the road. The road use as it is now has gone on for years with some conflict. Mr. Williams said that in his opinion, there is a big difference between granting a permanent encumbrance in such a location and allowing use. The Jensens do have an easement, so there is already a permanent encumbrance granted on that road. There is no reason to grant another permanent encumbrance in a different location. The road may be used for many years in a practical sense if the neighbors get along. If it gets to the point of granting a permanent encumbrance, DNRC recommends that it be along that boundary line.

Mr. Bloomquist said there has been a lot made out of the cow poop by the DNRC. On the record, the Jensens have no opposition to the lessee of the state lands grazing and utilizing this area. The other controversy started over other issues that do not need to be addressed at this point. The fact of the matter is that the fence that exists and manages the livestock does not need to be moved. As Mr. McGrath pointed out, the road will continue to be used by the lessee. What the DNRC is saying is "go build another road." Now, rather than two roads, the department wants three roads. The third road creates problems for the Jensens in terms of access, and for their neighbors, the Lohmans. Common sense might dictate that the road exists and the road is going to be used. The Jensens are asking for the authorization to use the road they believed they had an easement on in the first place. Cows will graze, pass through, do whatever cows want to do out there. The issue is, does the Land Board approve an easement to the existing road, rather than building a new fence and a new road that does not solve the Lohman's problem and is problematic for the Jensens. The DNRC's position flies in the face of good management of the trust resource itself. Why put more roads out there when the existing road situation will work?

MINUTES
December 17, 2007
Page 13

George Higgins, state land lessee, stated the problems started a year previous in September and have not been resolved. The only other crossing on state land is undergoing riparian work and has been tied up with FWP for five years. If the current crossing is messed with and the Jensens still continue with their objections and problems, the Higgins cows will not have a crossing. The Higgins will have to take their cows almost all of the way to Choteau and bring them back through the north section of the state land. There are no other crossings for a tractor or a car.

This has been 15 months of hell due to one problem or another with the easement. The easement was granted in 1977 and it should be maintained and used. If the Higgins have to fence the land off, both the Higgins and Jensens will continue to use it. Mr. Higgins stated his concern that Ms. Jensen would find some problem—the tractor digging a trench in her road, cow leaving a pile—and there would be no end. Mr. Higgins stated his desire to solve the problem once and for all for his son and nephew when they inherit the state lease. The problem has been going on for 18 years, since the Higgins moved to the property. The Jensens bought that place, and the only way they could finance it was through that easement. If the Jensens sell the land, they will have to have an easement to the property or whoever buys it will not be able to purchase the land. The same applies if we sold our place. All parties need a decision—either grant the easement or do not.

Margaret Sue Jensen, historic right-of-way applicant, stated that she complained about cow poop on the road in September 2006 because the Jensen's granddaughter was getting married and wanted to have the ceremony in the backyard. In the fall, cows began appearing in the Jensen's yard. The Jensens explained the problem to the Higgins and asked that the cattle guard be put back in the road. Mrs. Higgins said that could not be done, but they would put a gate across the road. Mrs. Jensen said the main reason for the complaint was that the Jensens wanted the road clear for their granddaughter's wedding, but the Higgins continued to put their cattle on the road all throughout the fall.

Mr. Morrison said the Land Board is being asked to grant a change of circumstances which confers a permanent, partial estate across state land. By definition that has some adverse effect, however small, to trust land. Mr. Morrison expressed his desire that the parties could go away and come to an agreement that preserved the status quo, where everyone could get along. Granting a new historic easement does create an issue for the trust. Mr. Morrison said he would make a motion to postpone decision on the easement if there was a possibility that the parties could reach an agreement.

Mr. Bloomquist stated that the Jensens would be willing to make the effort and try to work out some type of arrangement. The DNRC put the Jensens in this position by the denial. The Jensens would compensate the school trust for the historic right-of-way, but have never gotten to that point with the DNRC to determine full market value.

Ms. Sexton stated that the DNRC has been in the middle of the dispute. The DNRC staff have spent many hours trying to work something out. The DNRC's recommendation was what the department felt was best for the fiduciary responsibility of the trust and for the management responsibilities. It was the department's collective approach that this was the best recommendation for a difficult situation. The department also has a longstanding policy that it does not grant new access easements when there is already one in existence. There are many instances out there where neighbors would like to have additional access, but the DNRC grants historic access rights when there is nothing else in existence. The DNRC looked at the 1977

MINUTES
December 17, 2007
Page 14

easement that does exist and felt that was the best recommendation in a difficult situation. That is why the DNRC made the recommendation and denied the additional access application. Ms. Sexton reiterated that it is DNRC policy to not grant additional historical easements if one is already in existence.

Ms. McCulloch said this issue has brought in question whether the Land Board has the right to make a decision to grant an easement or not, and whether easements are granted without the Land Board getting to make a decision. Ms. McCulloch indicated that she felt the whole issue had been blown out of proportion.

Mr. Morrison asked if Mr. Bloomquist would like to withdraw the consideration of the application at this meeting to see if an arrangement can be agreed upon between the parties.

Mr. Bloomquist said that if the appeal could be considered at a future time, the Jensens would withdraw it from consideration at this meeting and try to work something out directly with the Higgins and the DNRC.

Consideration of the Jensen's appeal to the Land Board to overturn the DNRC's denial of an historic right-of-way was withdrawn.

Ms. Sexton said there are still the remaining easements to consider. There are two historic driveway requests, an historic pipeline utility, and new electric and telephone utility lines.

Motion was made by Ms. McCulloch to approve the remaining right-of-way applications. Seconded by Mr. McGrath. Motion carried unanimously.

108-8 OTTER CREEK PRESENTATION BY SECRETARY OF STATE

Item was withdrawn due to Secretary Johnson's absence due to weather.

Motion to adjourn was made by Mr. McGrath. Seconded by Ms. McCulloch.